

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
9849-s76C BY ROBERT L. MONK)

FINDINGS OF FACTS, CONCLUSIONS
OF LAW, AND ORDER

The amended Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on December 19, 1977, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. The Application for Beneficial Water Use Permit No. 9849-s76C by Robert L. Monk is granted to appropriate 4.18 cubic feet per second or 1,877 gallons of water per minute; not to exceed 250 acre-feet per annum from Pleasant Valley-Fisher River, a tributary of the Fisher River, in Flathead County, Montana, to be diverted from said river from June 1 to June 30 only of each year, at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, Township 28 North, Range 27 West, M.P.M., by means of a gravity ditch and delivered to a pump site in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 26, Township 28 North, Range 27 West, M.P.M., and used for new irrigation from June 1 to June 30, inclusive of each year, on 70 acres in Section 23, 83 acres in Section 24, 44 acres in Section 25, and 73 acres in Section 26 of the same township and range and containing a total of 270 acres, more or less.

2. The Applicant shall install and maintain a satisfactory measuring device at the point of diversion and shall submit to the Department upon request, records of the rate, period of diversion, and volume of water diverted.

3. The Permittee is specifically enjoined from appropriating the water granted by this permit at such times when the Big Meadows Grazing Association's and other valid prior water rights from the source of supply would be adversely affected by reason of inadequate rate or volume of stream flow remaining to satisfy such rights.

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4. The above permit is provisional and is granted subject to all valid prior water rights of the Big Meadows Grazing Association and others in the source of supply and subject to any final determination of prior existing water rights in the source of supply provided for by Montana law.

RECOMMENDATION

The Department recommends that all parties in this matter install and maintain adequate measuring devices to fit their particular individual situation, and keep a log of records of water used for their own proof of their water rights and protection.

Done this 3rd day of February, 1978.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION)	
FOR BENEFICIAL WATER USE)	
PERMIT NO. 9849-s76C BY)	<u>PROPOSAL FOR DECISION</u>
ROBERT L. MONK)	

Pursuant to the Montana Water Use and Administrative Procedures Act, after due notice, a hearing was held August 9, 1977 at Kalispell, Montana, for the purpose of hearing objections to the above-named Application for Beneficial Water Use Permit, William F. Throm, Hearing Examiner, presiding.

The Applicant, Robert L. Monk, appeared at the hearing and presented testimony on his behalf. He was also represented by legal counsel, Mr. Kenneth O'Brien, Attorney at Law. The Applicant did not present any exhibits in support of the application.

Objectors present at the hearing were: the Montana Department of Fish and Game, represented by Mr. Bob Schumacher, and the Big Meadows Grazing Association, represented by Eldon Christiensen, Manager, Gail Patton, Vice President, Paul Howser, Director, James Andrews, Director, Terry Prongua, Secretary-Treasurer, and Mr. Gene Phillips, Attorney at Law. The Objectors introduced into evidence three exhibits: Notice of Appropriation of Water Right, marked Objectors' Exhibit No. 1; Warranty Deed, marked Objectors' Exhibit No. 2; and Warranty Deed, marked Objectors' Exhibit No. 3. The

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above exhibits were received into evidence without objection.

The Department of Natural Resources was represented at the hearing by Mr. Jim Rehbein, Water Rights Bureau Field Manager, Kalispell, Montana. Mr. Rehbein introduced into evidence three photos of the Pleasant Valley Fisher River marked as Department's Exhibits 1, 2 and 3, and a map of the area showing the proposed point of diversion and place of use, marked as Department's Exhibit No. 4. These exhibits were received into evidence without objection.

PROPOSED FINDINGS OF FACT

1. On October 8, 1976, the Applicant, Robert L. Monk, submitted to the Department of Natural Resources and Conservation Application for Beneficial Water Use Permit No. 9849-s76C to appropriate 4.18 cfs or 1,877 gpm of water and not to exceed 675 acre-feet per annum from the Pleasant Valley Fisher River, a tributary of the Fisher River, in Flathead County, Montana, to be diverted from said river by means of a pump at a point in the SW1/4 NW1/4 NW1/4 of Section 26, Township 28 North, Range 27 West, M.P.M., and used for new irrigation on 70 acres in Section 23, 83 acres in Section 24, 44 acres in Section 25 and 73 acres in Section 26, all in Township 28 North, Range 27 West, M.P.M., and containing a total of 270 acres, more or less, from June 1 to September 30, inclusive, of each year.

2. On December 2, 9 and 16, 1976, the Department caused to be duly published in the Daily Interlake, Kalispell, Montana, notice of above Application No. 9849-s76C.

3. On January 20, 1977 the Department received a letter from the Montana Department of Fish and Game expressing a concern for the adverse impact to the fishery in the lower Pleasant Valley-Fisher River and Loon Lake resulting from the withdrawal of 4.18 cfs from the source of supply from July through the winter months.

4. On January 24, 1977, the Department received an objection to Application No. 9849-s76C from the Big Meadows Grazing Association.

5. At the hearing on August 9, 1977 the Applicant stated that the original Application No. 9849-s76C contained an error in the legal description of the point of diversion. He then submitted to the Hearing Examiner a revised Application No. 9849-s76C dated August 9, 1977 correcting the point of diversion showing it to be in the NW1/4 NW1/4 SW1/4 Section 36, Township 28 North, Range 27 West, M.P.M., and to be delivered to a pumpsite in the SW1/4 NW1/4 NE1/4 of Section 26 same Township and Range with no other changes.

6. The Applicant testified that he proposes to divert 4.18 cfs of excess waters from the Pleasant Valley-Fisher River by means of an existing diversion dam and headgate, located in the NW1/4 NW1/4 SW1/4 of Section 36, Township 28 North, Range 27 West, and route the water through an existing ditch, to be enlarged, to a pump site located in the SW1/4 NW1/4 NE1/4 of Section 26, same township and range. From the pump site the water will be delivered by pipeline to 270 acres of land to be newly irrigated by a sprinkler irrigation system as designed by the Soil Conservation Service. The

Applicant proposes to irrigate hay and pasture and testified that he believes there is sufficient unappropriated water from the source for this purpose without adversely affecting prior water right users. The Applicant further testified that it is his intent to divert excess water from the source and pump it for storage in a small lake to be used as a sump for later use during each irrigation season when water is no longer available from the source of supply.

7. Mr. Bob Schumacher testified that the Pleasant Valley Fisher River is the principle tributary to Loon Lake for trout spawning; that the diversion of 4.18 cfs from Pleasant Valley-Fisher River during July, August, September and the winter months, when the river is already in short supply, will dewater it to the extent it will no longer be a viable fishery; that the Pleasant Valley-Fisher River provides a valuable public recreation area and that the public interest should be protected by denying this permit.

8. Representatives from the Big Meadows Grazing Association testified that the Pleasant Valley-Fisher River provides excess water during April, May and early June only during a normal year. That diversion of 4.18 cfs during late June through September would adversely affect that Association's prior water rights, and many years their requirements are not met, and in 1973 and this past year, the source of supply was critically low.

9. Jim Rehbein testified that hydrologic records available to him were inconclusive and unsuitable for making

a Department recommendation; that the nearest gaging station is the Wolf Creek station with 195 square miles of drainage providing an average annual yield of 51,000 acre-feet based upon 8 years of record but that there are several tributaries contributing to the streamflow between this station and the Applicant's point of diversion.

PROPOSED CONCLUSIONS OF LAW

1. The Big Meadows Grazing Association has apparent prior water rights appropriations on Pleasant Valley-Fisher River, the source of supply.

2. The Montana Department of Fish and Game has no known prior appropriations, reservations, permits or applications for reservation of water from the source of supply nor was instream flow uses for fisheries, wildlife or recreational benefits recognized prior to enactment of the 1973 Water Use Act as a beneficial use to establish a use right which would have been protected by that Act. It is therefore concluded that the Montana Department of Fish and Game's objection does not constitute a valid objection to be considered in deciding this case.

3. It is concluded that correction of the original Application for Beneficial Water Use Permit to show the actual proposed point of diversion would have no adverse affect on prior appropriators not represented at the hearing therefore re-publishing of the Public Notice to water users was not necessary in this case.

4. It is concluded that the Applicant's intentions were to store excess diverted water, however, the application as

submitted and noticed did not include storage, therefore the permit can not be granted to include this use.

5. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from the proposed source of supply.

6. There are at times unappropriated waters in the proposed source of supply. Such times when there are unappropriated waters occurs principally in the spring and early summer from the middle of April through June. It is further concluded from the testimony given that said unappropriated waters are not available in the amount requested throughout the period during which the Applicant seeks to appropriate, thus potentially rendering this proposed project infeasible for the purpose intended.

7. The rights of prior appropriators will be protected if the permit is conditioned to protect those rights.

8. The proposed means of diversion will be adequate if the Applicant complies with plans and specifications as tentatively proposed by the Soil Conservation Service.

9. The proposed use of water is a beneficial use.

10. The proposed use of water will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

11. The criteria for issuance of a permit set forth in Section 89-885, R.C.M. 1947 have been met.

12. The Application for Beneficial Water Use Permit

No. 9849-s76C may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

PROPOSED ORDER

1. The Application for Beneficial Water Use Permit No. 9849-s76C by Robert L. Monk is granted to appropriate 4.18 cubic feet per second or 1877 gallons of water per minute; not to exceed 250 acre-feet per annum from Pleasant ValleyFisher River, a tributary of the Fisher River, in Flathead County, Montana, to be diverted from said river from June 1 to June 30 only of each year, at a point in the NW1/4 NW1/4 SW1/4 of Section 36, Township 28 North, Range 27 West, M.P.M., by means of a gravity ditch and delivered to a pump site in the SW1/4 NW1/4 NE1/4 of Section 26, Township 28 North, Range 27 West, M.P.M. and used for new irrigation from June 1 to June 30, inclusive of each year, on 70 acres in Section 23, 83 acres in Section 24, 44 acres in Section 25, and 73 acres in Section 26 of the same township and range and containing a total of 270 acres, more or less.


2. The Applicant shall install and maintain a satisfactory measuring device at the point of diversion and shall submit to the Department upon request records of the rate, period of diversion, and volume of water diverted.

3. The above permit is provisional and is granted subject to all prior water rights in the source of supply and subject to any final determination of prior existing water rights in the source of supply provided for by Montana law.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be mailed to the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 31st day of October, 1977.


WILLIAM F. THROM
HEARING EXAMINER

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